Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

LUCRE, INC.,
Petitioner,

v.

GIBSON COUNTY, INDIANA,
Respondent.

Petition For A Writ Of Certiorari
To The Indiana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the constitutional right to just compensation in condemnation cases is denied by a judgment not based upon the uncontested highest and best use for the property?

2. Whether the failure to allow the income capitalization approach to the valuation of property with intrinsic value deprives a citizen of its right to just compensation when it is undisputed that the market values this particular property in this manner?

3. Whether the fifth amendment's guarantee of just compensation for the highest and best use value prohibits the giving of a jury instruction contrary to that guarantee?

4. Whether prohibiting option contract valuations as evidence of highest and best use value violates a citizen's right to just compensation?

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PETITION FOR A WRIT OF CERTIORARI

Lucre Corporation ("Lucre"), through its counsel, petitions for a Writ of Certiorari to the Indiana Supreme Court.

OPINIONS BELOW

The Pike Circuit Court's, an Indiana Trial Court, entry of a Judgment in favor of Lucre in the amount of $130,500.00 on February 24, 1994 is unreported (App. D). The Indiana Court of Appeals opinion affirming that Judgment was entered on November 2, 1995 and is reported as 657 N.E.2d 150 (Ind.App. 1995) (App. B). The Indiana Court of Appeals' denial of a Petition for Rehearing on January 10, 1996 is not yet reported. (App. C). The Indiana Supreme Court's denial of a Petition to Transfer on May 24, 1996 is not yet reported. (App. A).

JURISDICTION

The denial of transfer by the Indiana Supreme Court was rendered on May 24, 1996. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a) and Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. V:

> . . . nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Lucre owned two hundred sixty one (261) acres of property located in Gibson County, Indiana. The property had historically been recognized as a potential landfill site. In the 1970's, a city entered into an option agreement with the owners of the property for use of the property as a landfill.

Gibson County ("Government") hired an engineer to find a new landfill site. After an extensive search the Lucre property was found to be the best site.

The value of the Lucre site is derived from its intrinsic nature. The property is uniquely suited for a landfill. The land is unique in its geology and hydro-geology. Its soil composition meets the stringent requirements of the Indiana Department of Environmental Management and is preferable in part for technical reasons. The highest and best use of the Lucre site was therefore as a landfill. This was not only a site that was acceptable or had the potential for landfill development, but was the "best" site in the County.

The property owner was already in the process of marketing the property as a landfill site but agreed to discuss a business arrangement with the Government for use of the

property. A condemnation action was filed on March 24, 1992.

Each of the questions presented to this Court for review have been preserved throughout the trial and the appeals process. Each question asks, in one manner or another, what highest and best use valuation means in the context of the requirement of the fifth amendment to supply just compensation to land owners.

The first question is based upon a Motion for Judgment Notwithstanding the Verdict in that the jury's verdict in that the amount awarded is not supported by highest and best use evidence. That objection occurred at the trial court level after the jury award had been read. (App. 55-60) The question was preserved on appeal through Lucre's Appellant's brief . (App.36). The question was requested to be reviewed by the Indiana Court of Appeals in Lucre's Petition for Rehearing Brief and in Lucre's Brief in Support of Petition for Transfer. (App. 47 & 49).

The second question presented for this Court's review is whether property with intrinsic value must be allowed income capitalization valuation to determine its highest and best use value. That question was presented to the trial court in the Government's Motion in Limine which was objected to by Lucre. (App.61). The trial court excluded the evidence and Lucre made an offer to prove at trial which was denied. (App. 64-65). The question was preserved through the appeals process by Lucre's Appellant's Brief. (App. 29). The question was presented later to the Indiana Court of Appeals on Petition for Rehearing and to the Indiana Supreme Court, on Lucre's Petition to Transfer. (App.45 & 53).

The third question presented for the Court's review is whether the fifth amendment's guarantee of just compensation through awarding the highest and best use value prohibits the giving of a contrary jury instruction. This question was presented to the trial court through Lucre's objection to the improper instruction. (App. 66-67) The issue was raised on appeal in Lucre's Appellant's Brief. (App. 38). The question was presented again to the Indiana Court of Appeals on a Petition for Rehearing and later to the Indiana Supreme Court on a Petition for Transfer. (App. 43 & 50).

The final question presented for this Court's review also asks whether or not the highest and best use valuation required by the fifth amendment required option contract valuations to be admitted at trial. This question was raised in the Government's Motion in Limine which Lucre objected to in its response in Lucre's Brief in Opposition to the Motion. (App.68-71), the Court granted the Motion in Limine over that objection which was the subject of an offer to prove at trial. (App. 72-73) The question was raised again in the Indiana Court of Appeals by Lucre's Appellant's brief. (App. 33) Later it was raised in Lucre's Petition for Transfer and Petition for Rehearing. (App. 44 & 51).

REASONS FOR GRANTING THE PETITION

This petition is brought under the "just compensation" clause in the Fifth Amendment to the United States Constitution. The just compensation clause requires the government to pay private landowners for the government's condemnation of the landowners' private property. U.S. v. Miller, 317 U.S. 369 (1943) The just compensation clause applies to the states. Penn Central

Transportation Company et. al. v. City of New York, 438 U.S. 104, 122 (1978).

The State of Indiana has allowed property to be taken from Lucre without requiring payment of just compensation by the Government.

A. AWARD WAS NOT FOR HIGHEST AND BEST USE VALUE

The issue, in the context of eminent domain, is what is evidence of the highest and best use of property. A landowner is entitled to the value of the highest and best use of the land being taken. See e.g., Olson v. U.S., 292 U.S. 246, 255-256 (1933). Any evidence of the value of the highest and best use of the land must be considered, and by definition any valuation based upon any use other than highest and best use is inappropriate.

The parties, through their witnesses, agreed that the highest and best use of the Lucre site was as a landfill. The only evidence of the value of the land as a landfill indicates that the landfill highest and best use value of the Lucre property was $6,300,000.00. Another $130,000 valuation of the land based solely on the current use of the property and not on the property's highest and best use as a landfill would not produce a highest and best use valuation. The trial court's $130,500 judgment clearly does not award a landowner just compensation at a highest and best use value.

This Court has not previously decided if evidence of property value not based upon highest and best use value is by law sufficient to support a verdict in an eminent domain case.

Finally, this matter is of great public importance in that the right to just compensation for highest and best use is meaningless if the government can take land for current use value only.

B. INTRINSIC VALUE REQUIRES INCOME CAPITALIZATION

Income capitalization testimony was improperly excluded from the jury where there was undisputed expert testimony stating that this is how the market values this property. A number of courts have recognized the propriety of using the income capitalization method of valuation of property in certain circumstances, particularly where the property has an intrinsic value due to minerals on the property. See e.g. U.S. v. 22.80 Acres of Land, In the County of San Benito, State of California, et. al., 839 F.2d. 1362, 1364 (C.A.9th, 1988). Landfills, like stone quarries, are valued for the dirt of which the land is made. Landfills must have a specific geology and hydro-geology. As a result landfills have an intrinsic value entitled to be valued by the income capitalization method.

This Court has not indicated whether the income capitalization method of valuation is required where the condemned property has an intrinsic value as a result of the land's geological characteristics and where there is expert testimony indicating that the market values the property in this manner.

Finally, this issue is of great importance to the public. If the income capitalization method of valuation which the market uses to value property is not required by courts, citizens will be deprived of just compensation for a valuable commodity intrinsic to their land.

C. JURY INSTRUCTION ORDERED CURRENT USE VALUATION

A property owner is entitled to the highest and best use value for his property in eminent domain proceedings. See e.g. Penn Central, 438 U.S. at 122. Jury instruction 8A misstated that constitutional guarantee. The jury was instructed:

> In determining the amount of compensation that Lucre Corporation is entitled to recover as a result of the taking, you may consider any evidence that effects the value on the date of the taking in arriving at a fair market value. However, **the inquiry as to the value of the land** cannot go into an intended specific use, because such damages are speculative, and that such inquiry **must be confined to the land with reference to its condition at the time of taking.** (emphasis added)

A statement that the jury's "**inquiry as to the value of the land... must be confined to the land with reference to its condition at the time of taking**", confining the inquiry to the then current use is contrary to the constitutional right which requires compensation instead for the land's highest and best use.

This Court has not before decided the point at which improper jury instructions are constitutionally unacceptable in eminent domain cases. Lucre prays this Court grant this Petition so that the Government will, now and in the future, be unable to escape its constitutional duties through incorrect jury instructions.

D. EXCLUSION OF OPTION EVIDENCE OF MARKET VALUE IS IMPROPER

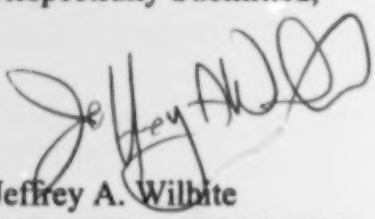
The trial court admitted an earlier option contract for the purchase of the property as a landfill but excluded the purchase price within that contract. The exclusion of the option contract valuation of the property, by redacting it from the contract, was improper. The heart of the exhibit should not have been cut because an expert would have testified the figure itself was indicative of the property's premium value. An expert testified in a thorough offer to prove hearing that the option contract figure itself was in this case indicative of the value of the property in this particular market for this particular site. The trial court in effect determined as a matter of law that expert testimony on land valuation is prohibited when the expert is going to verify the valuation of the land contained within a contract for an option to purchase land.

By excluding the option contract's valuation of the property, with its undisputed supporting expert testimony that it is indicative of the property's highest and best use value, the trial court denied Lucre of its right to just compensation.

CONCLUSION

The Petition for Certiorari should be granted and set down for briefing and argument on the merits.

Respectfully Submitted,



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APPENDIX A

IN THE INDIANA SUPREME COURT

Cause Number:
63A04-9406-CV-00250

Lower Court Number
63C019205CP72

LUCRE CORP VS. GIBSON COUNTY, IN.

You are hereby notified that the Supreme Court has on this day 5/24/96 Appellant's Petition for Transfer is hereby denied.

Randall T. Shepard, Chief Justice

All Justices Concur.

APPENDIX B

IN THE INDIANA COURT OF APPEALS

Cause Number:
63A04-9406-CV-00250

Lower Court Number
63C019205CP72

LUCRE CORP VS. GIBSON COUNTY, IN.

You are hereby notified that the Court of Appeals has on this day 11/02/95 issued the enclosed opinion:

OPINION - FOR PUBLICATION
November 2, 1995

Defendant - Appellant Lucre Corporation (Lucre) appeals from a judgment awarding it compensation for the appropriation of its property by Gibson County (County).

We affirm.

ISSUES

Lucre presents four issues for our review which we restate and consolidate as:

1. Did the trial court err by excluding evidence offered by Lucre.

2. Did the judgment deprive Lucre of just compensation based on the highest and best use of its property?

3. Did the judgment awarding compensation to Lucre violate an earlier bifurcation order?

FACTS

Lucre owned 261 acres of unimproved property which was the site of an abandoned strip mining operation located in Gibson County, Indiana. In 1992, the County hired an engineer to find a new landfill site to meet its future needs. Lucre's property was found to be suitable as a landfill and the County offered to purchase Lucre's property. When the County was unable to negotiate a purchase price, it sought to take the property by eminent domain. Towards that end, on March 24, 1992, the County filed a complaint for condemnation.

During a trial held on November 29, 1993, the jury heard testimony from experts who valued Lucre's property from $130,000.00 to $6,000,000.00. In addition, testimony revealed that as of the date of taking, no landfill operations were conducted or permitted under applicable law on the property, neither were other income-producing operations

conducted on the property at that time. However, testimony did reveal that the highest and best use of Lucre's property was as a landfill.

The jury assessed the damages to Lucre in the amount of $130,500.00. It is from this judgment that Lucre now appeals.

DISCUSSION

I.

Lucre contends that the trial court erred by unduly restricting Lucre's testimony regarding the value of its property.

The admission of evidence is a matter of trial court discretion. Eversole v. Consol. Rail Corp. (1990), Ind.App., 551 N.E.2d 846, 854, reh'g denied, trans. denied. We will reverse a trial court decision on the admission of evidence only for an abuse of discretion, which occurs if the decision is clearly against the logic and effect of the facts and

circumstances before the court or the reasonable, probable, and actual deductions to be drawn from those facts and circumstances. Id. Myers v. Myers (1990) Ind., 560 N.E.2d 39, 42. "The term 'discretion' implies the absence of a hard and fast rule or a mandatory procedure regardless of varying circumstances." Stone v. State (1989), Ind.App., 536 N.E. 2d 534, 538, trans. denied. Thus, matters committed to the discretion of the trial court are those requiring an on-the-spot decision to be made in light of the trial judge's knowledge, sense of fairness and equity, and the fact and circumstances present in the courtroom. See id.

Lucre argues that his expert valuation witness should have been able to testify as to the value of the property utilizing the capitalization approach to a valuation. "[T]here have not been an abundance of recent landfill sales in Gibson County, the jury should have heard testimony that the capitalization approach is used in the market regardless of

whether a landfill is currently operating." Appellant's Brief at 7-8. We note that Lucre does not support this assertion with authority from this jurisdiction or elsewhere.

Capitalization is one of three well recognized methods of determining a property's fair market value taken by eminent domain. Annon II, Inc. v. Rill (1992), Ind.App., 597 N.E.2d 320, 326, reh'g denied, trans. denied.[1] It is a method of computation which gives value to the land in relation to the income it produces. State Highway Comm'n v. Jones (1977), 173 Ind.App., 243, 245, 363 N.E.2d 1018, 1021.

> [It] usually consists of arriving at an independent value of the land involved and adding to it the value of improvements arrived at by process of capitalization, i.e., converting reasonable or actual income at a reasonable

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[1] In Ohio Casualty Ins. v. Ramsey (1982), Ind.App., 439 N.E.2d 1162, 1167, this Court set out three methods of determining a property's fair market value taken by eminent domain: "(1) the current cost of reproducing the property less depreciation from all sources; (2) the 'market data' approach or value indicated by recent sales of comparable properties in the market, and (3) the 'income approach,' or the value which the property's net earning power will support based upon the capitalization of net income." Id.

> rate of return (capitalization rate) into an indication of value. Land and improvements may be capitalized together in a single process.

4 Sackman, Nichols on Eminent Domain Sec. 12.32.(3)(c), at 12-577 (3d) rev. ed. 1981) (Parentheses supplied)

In J.J. Newberry Co. v. City of East Chicago for and on Behalf of Dept. of Redevelopment (1982), Ind.App., 441 N.E.2d 39, 42, we found that a "proper application of the capitalization of income method requires that 'the property is in good condition and capable of producing the income to be capitalized.'" Id. at 42 (quoting 29A C.J.S. Eminent Domain Sec. 168(2), at 724-25 (1965)). Further, "'income cannot be capitalized to produce a residual value where the appropriated land is neither producing income nor equipped to do so.'" Id. Although Lucre's property was found to be suitable for landfill use, it was neither improved nor

producing income as a landfill or otherwise as of the date of taking. The trial court precluded evidence of the capitalization value of the property because the property was currently not producing income. We cannot, in light of our precedent, say that the trial court abused its discretion in excluding this testimony. See also Jones, 173 Ind.App. at 254, 363 N.E.2d at 1025 (The capitalization method of determining value was admissible because the case involved the appropriation of land suitable for quarrying which was a part of an ongoing quarry operation. The capitalization of income was not used to project future profits and to compensate the owner for lost profits, but rather it was used to calculate the fair market value of the land at the time of taking).

Lucre also offered as evidence an option agreement which contained a $2,000.00 - per-acre price for the property. In 1978, the City of Evansville paid $1.00 for an option to

purchase Lucre's property for $2,000.00 an acre. The option had to be exercised by November 11, 1978, but could be renewed until January 11, 1979 for an additional $2,000.00. The agreement was neither renewed nor exercised by Evansville. Although the trial court allowed the option document into evidence, Lucre argues that it erred when it redacted the amount of the offer.

Although Indiana courts have not addressed the admissibility of an option agreement to prove value directly, precedent suggests that option agreements are inadmissible to prove value. A mere offer to sell is properly excluded as evidence of value. Warren v. Wheeler (1991), Ind.App., 566 N.E.2d 1096, 1099, trans. denied; State v. Lincoln Memory Gardens, Inc. (1961), 242 In. 206, 177 N.E.2d 655. In Lincoln Memory Gardens, the trial court excluded testimony of an offer to sell property in a condemnation case, and our supreme court affirmed this decision holding:

> A mere offer to buy or sell property is not a measure of the market value of a similar property. It is incompetent to prove the market value of the property because the asking price is only the opinion of one who is not bound by his statement, and is too unreliable to be accepted as a correct test of value.

Id. at 213, 177 N.E.2d at 658. Further, in Gradison v. State (1973), 260 Ind. 688, 300 N.E.2d 67, our supreme court upheld a trial court's refusal to admit a proposed lease by a gravel-mining company to lease a portion of the property at a stated sum per acre because the lease "would have imposed no obligation upon the offeror, until such time as it elected to exercise its rights thereunder. It was, therefore, more in nature of an option than of a binding lease or sale." Id. at 710, 300 N.E.2d at 82.

The Court in Gradison also stated that "[w]e are aware that a few other jurisdictions have, under circumstances where there was no better evidence offered, accepted evidence of bona fide offers under rigid

standards.....We have not previously admitted such evidence and, although not determinative upon the issues in that case, we indicated in Marposon [] v. State [] (1982), [259] Ind. [426], 287 N.E.2d 857, that we probably would not." Gradison, 260 Ind. at 710, 300 N.E.2d at 82. Considering our precedent, we cannot say the trial court in this case abused its discretion when it redacted the option price from the agreement.

Lucre further argues that offers have been held to be admissible to prove the existence of an active market or demand for the property, and to support the feasibility of a property's highest and best use. See Appellant's Brief at 13. However, in this case the unexercised Evansville option was over fourteen years old, and thus, not indicative of the market at the time of the taking, and the record reveals ample testimony to the use of the property as a landfill. Further, the option was admitted, albeit redacted, and was available to

prove any issue, save valuation of the property. We see no error here.

Lucre next argues that the trial court erred by omitting evidence of a recent sale of property. However, Lucre neglects to provide citation to authority in support of this claim or cogent argument on this issue. Therefore, consideration of this issue has been waived. Ind.Appellate Rule 8.3(A)(7); J.L. v. Mortell (1994), Ind.App., 633 N.E.2d 300, 303, trans. denied. Notwithstanding waiver, Lucre's assertions cannot succeed.

"Evidence of sales made subsequent to the taking are not admissible unless made almost simultaneously with the taking." Gradison, 260 Ind. at 705, 300 N.E.2d at 79. The property sale in question took place in October, 1993, more than a year and a half after March 24, 1992, the date of the

taking of Lucre's property. We cannot find that the trial court exclusion of this evidence was in error.[2]

Lucre argues that the trial court erred by omitting evidence of the "unique market demand for landfill sites at the time of the taking." Appellant's Brief at 5. To prove a market perception of heightened demand for landfill sites, Lucre offered a collection of newspaper articles, some of which were undated and at least one which was published after the date of the taking, discussing landfill capacity problems in the surrounding counties. The trial court sustained the County's objection on the basis of hearsay; however, Lucre argues that the articles were not offered for their truth, but rather for the fact that they existed citing Kucki v. State (1985), Ind.App., 483 N.E.2d 788, 791, reh'g denied. Considering that Lucre's experts testified about the

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[2] We also note that in the Appellant's Reply Brief, Lucre asserts that the County has waived this argument by only objecting to this evidence on the basis that it did not have sufficient notice of the sale. This is an inaccurate portrayal of the County's argument before the trial court. See (R. at 576).

situation discussed in the newspaper articles, and there was no dispute that publication occurred, any error in the trial court's refusal to admit the exhibit was harmless. Powers v. Gartineau (1992), Ind.App., 568 N.E.2d 1020, 1026, trans. denied.

Finally, Lucre contends that the trial court erred in not allowing Lucre to introduce a Department of Natural Resources mine map. Appellant's Brief at 6. It argues that the mine map was self-authenticating pursuant to Ind.Trial Rule 44(a)(1). "An official record 'may be evidenced by an official publication thereof or a copy attested by the officer.'" Appellant's Brief at 23 (quoting T.R. 44(a)(1) emphasis in Brief). Thus, Lucre argues that a document is self-authenticated by merely being an official publication. We cannot agree.

As we read T.R. 44(a)(1), and as it has been generally understood by reviewing courts, authentication for the

admission of an official records requires an officer having custody of the record to attest, by testimony or by certification, that it is the official original record, or a true and accurate copy thereof. Liberty Nat. Bank and Trust v. Payton (1992), Ind.App., 602 N.E.2d 530, 533; Kelly v. State (1990), Ind., 561 N.E.2d 771, 773. The single case that Lucre cites to support his theory merely recites the trial rule, without advocating Lucre's argument. See Elridge v. State (1977), 266 Ind. 134, 138, 361 N.E.2d 155, 158, cert. denied 434 U.S. 928. The trial court did not err by refusing to admit the mining map without proper authentication.

II.

Lucre contends that it is entitled to just compensation based exclusively on the property's highest and best use, and the County's argument to base compensation on current use is contrary to law. Lucre argues that (1) the judgment is contrary to the undisputed highest and best use evidence, and

(2) that the trial court's highest and best use instruction was erroneous.

When land which is taken by condemnation has a fair market value at the time of its appropriation, the measure of damages is the fair market value for which the land could be sold if an owner was willing to sell and a buyer willing to buy, neither under compulsion to do so. City of Lafayette v. Beeler (1978), 178 Ind.App., 281, 287, 381 N.E.2d 1287, 1291. If property has a higher market value by reason of uses to which it may be adapted, but to which it has not been put, the owner is entitled to a greater value. Id., State v. City of Terre Haute (1968), 250 Ind. 613, 617, 238 N.E.2d 459, 461. The market value of the condemned property insofar as that value is presently enhanced by the property's adaptability for some use may be shown, but the possible future value of the specific future use may not be proven. Beeler, 178 Ind.App. at 289, 381 N.E.2d at 1292.

Judge Miller in Beeler, as well as out supreme court in State v. Tri-State College, (1972), 258 Ind. 307, 311, 280 N.E.2d 813, 815, quoted 11 ILE Eminent Domain, (1958) as instructive on this issue:

> It has long been the established rule in determining the value of property taken by condemnation or appropriation the availability and adaptability of the property for uses other that that to which it is applied at the time of taking, may be taken into consideration. The pre-existing use of the land is not the sole criterion by which its value is measured. However, it is equally well settled that the inquiry as to damages cannot go into an intended specific use, because such damages are speculative, and that such inquiry must be confined to the land with reference to its use and condition at the time of taking and not as to what use the owner might be contemplating to put it.

Beeler, 178 Ind.App. at 291, 381 N.E. 2d at 1293. Thus, the issue before the jury was the value of the land on the date of the taking. Consideration may be given to the property's potential use and value, but future improvements may not be

compensated for because they were not then in existence. Southern Indiana Gas & Electric Co. v. Riley (1973), 260 Ind. 643, 645, 299 N.E.2d 173, 175; see also State v. Maplewood Heights Corporation (1973) 261 Ind. 305, 308, 302 N.E.2d 782, 785; State v. Raymond E. Heinold Family Trust (1985), Ind.App., 484 N.E.2d 595, 598, reh'g denied, trans. denied.

It is undisputed that on the date of the taking, Lucre's property was unimproved, abandoned, strip-mined land. Although suitable for use as a landfill, there was no landfill operation, in fact, Lucre did not have a landfill permit at the time of the taking. The County's expert testified that he valued the property by comparing it to other similar land sales in Gibson County. Lucre offered the testimony that the highest and best use of the land was as landfill, as well as testimony of the value of other landfill properties in various locations.

Generally, we will not disturb an award or damages in an eminent domain proceeding where the award if within the bounds of the probative evidence adduced at trial. Heinold Family Trust, 484 N.E.2d at 597; Beyer v. State (1972), 258 Ind. 227, 236, 280 N.E.2d 604, 610; City of Indianapolis v. Schmid (1968), 251 Ind. 147, 152, 240 N.E.2d 66, 69. On review of such an award, the appellate court will neither reweigh the evidence not judge the credibility of the witnesses. City of Elkhart v. No-Bi Corp. (1981), Ind.App., 428 N.E.2d 43, 45. The evidence will be looked at in a light most favorable to the judgment. Id.

While these rules tend to give great deference to damage awards in eminent domain cases because of the factfinder's ability to hear the evidence and judge the credibility of witnesses first hand, a jury may not base its verdict upon their independent knowledge of values. Gradison, 260 Ind. at 705, 300 N.E.2d at 74-75. "[I]f the

testimony of value and damages is conflicting, the jury may resort to their own general knowledge of the elements which affect the assessment, in order to determine the relative weight of conflicting testimony, but their assessment must be supported by testimony, or it cannot stand." Id.

The record reveals that the experts valued Lucre's property from $130,000.00 to $6,300,000.00; the jury determined Lucre's damages to be $130,500.00. The award was within the bounds of the probative evidence adduced at trial, thus we see no error here. See Annee v. State (1971), 256 Ind. 686, 689, 271 N.E. 2d 711, 712, reh'g denied (jury award of $210,000.00 "clearly falls within the bounds of the probative evidence" where opinions ranged from $171,700,00 to $541,000.00); Caito v. State (1973), 157 Ind.App. 679, 683, 301 N.E.2d 376, 377 (upholding jury award of $317.00 which was in conformity with testimony of

the State's only expert where damages testimony ranged from $317.00 to $45,000.00).

Lucre also complains about Instruction 8A given by the trial court. Instruction 8A reads:

> In determining the amount of compensation that Lucre corporation is entitled to recover as a result of the taking, you may consider any evidence that affects the value on the date of the taking in arriving at a fair market value. However, the inquiry as to the value of the land cannot go into an intended specific use, because such damages are speculative, and that such inquiry must be confined to the land with reference to its condition at the time of taking.

(R. at 504, 1707). Lucre argues that this instruction

> tells the jury it "must" confine its inquiry to the "condition" of the land "at the time of taking." That is an incorrect statement of the law. In order to award just compensation, a land's "current condition" cannot restrict the award. Certainly the land must at the time of take with reasonable adaptation be capable of having the higher use, but the essence of a highest and best use analysis is to look prospectively at a reasonable adaptation of current condition. 8A prohibits that prospective reasonable adaptation analysis. The instruction is also an "intended specific

> future use instruction," but there was no such claim at trial.

Appellants Brief at 21-22.

We cannot agree with Lucre's argument. As we have discussed, Instruction 8A is a correct statement of the law. Further, Lucre's argument regarding "reasonable adaptation" as a component of valuation fails to take into consideration Instruction 8, read to the jury immediately prior to 8A, which states:

> The past or present use to which land is put is not the only criterion to be considered in determining its value. In determining the amount of the compensation that the landowners are entitled to recover as a result of the taking, you may consider the highest and best use for which the property is available and could reasonably be adapted at the time of the taking by Gibson County, Indiana.

(R. at 503, 1706). We see no error here.[3]

---

[3] Lucre also claims that the trial court erred in refusing to give its Tendered Instruction No. 2, which reads:

III.

Finally, Lucre contends that the trial court's judgment erroneously fails to indicate that compensation for Lucre's mineral rights remain an issue to be adjudicated at a future date. We do not agree.

On November 17, 1993, the court issued an Agreed Bifurcation Order which states, in part:

> that the issue of the compensation to the landowner may be entitled to for the direct or inverse appropriation of, or damage to, any mineral interest and rights in, or related to, the subject real estate or the direct or inverse appropriation of, or damage to, the real estate considering such mineral interests and rights, is hereby bifurcated from the November 29, 1993 trial and is reserved to be decided at a later date which shall be set by the Court.

> The landowner is entitled to recover all damages, present or prospective, that are a natural or reasonable result of the taking.

(R. at 493). Although Lucre correctly points out that this instruction is based on Indiana Pattern Jury Instructions 29.19, in this case the substance of the tendered instructions was adequately covered by others given by the trial court, that is, Final Instructions 8 and 8A and thus, the trial court properly refused it. See City of Lake Station v. Rogers (1986), Ind.App., 500 N.E. 2d 235, 241. We also note that Lucre fails to state "whether the refusal to give the instruction resulted in prejudice to the party who tendered it." Id. at 240.

(R. at 370). The Entry of Final Judgment on Exception of Defendant to Report of Appraiser, issued February 24, 1994, awarded Lucre $130,500.00. The judgment regarded "the issue of the value of the property taken by Plaintiff" and does not prevent the remaining issue of compensation for Lucre's mineral rights from being set for trial. Further, Lucre does not complain that the trial court refused to set the remaining issue for trial, nor does the County argue that the Entry of Final Judgment included the value of the mineral rights. Thus, we see no reason to amend the trial court's judgment.

Judgment affirmed.

Sharpnack, C.J. and Barteau, J. Concur.

APPENDIX C

IN THE INDIANA COURT OF APPEALS

Cause Number:
63A04-9406-CV-00250

Lower Court Number
63C019205CP72

LUCRE CORP VS. GIBSON COUNTY, IN.

You are hereby notified that the Court of Appeals has on this day 1/10/96
Appellant's petition for rehearing denied.
John T. Sharpnack, Chief Judge

APPENDIX D

IN THE PIKE CIRCUIT COURT

Cause Number:
63A04-9406-CV-00250

LUCRE CORP VS. GIBSON COUNTY, IN.

This cause having come before the Court for trial by Jury on November 29, 1993, through December 3, 1993, the parties appearing personally and by counsel, and the issue of the value of the property taken by Plaintiff by Order of Appropriation of Real Estate and Appointment of Appraisers dated August 7, 1992, and Exceptions of Defendant to Report of Appraisers filed on September 24, 1992, and the Jury having rendered its verdict and having assessed damages in the amount of $130,500.00 for Defendant;

And it appearing to the Court from the record in this cause that on September 4, 1992, appraisers appointed by this Court to assess the damages sustained by Defendant filed herein their Report of Appraisers' assessing the damage of Defendant at $130,000.00.;

And it further appearing to the Court that Plaintiff has not paid to the Clerk of the Court the damages thus assessed to Defendant by said appraisers;

And it further appearing to the Court that ten (10) or more days prior to trial Plaintiff submitted a written offer of settlement to Defendant which exceeded the total of the

damages awarded by the verdict of the Jury returned for Defendant;

And the Court, having jurisdiction over the parties and the subject matter pursuant to Ind. Code § 32-11-1-1 et.seq. hereby

ORDERS, ADJUDGES, AND DECREES that Defendant, Lucre Corporation, have and recover from Plaintiff, County of Gibson, State of Indiana, the sum of $130,500.00, together with interest at the statutory rate of eight percent (8%) per annum from the date of appropriation, August 7, 1992, until the date Plaintiff, County of Gibson, State of Indiana, pays to the Clerk of the Court the damages assessed to Defendant, costs paid.

Entered this 24th day of February, 1994.

APPENDIX E

LUCRE'S APPELLANT'S BRIEF
(pp 7-14 & 17-22)

LUCRE'S VALUATION TESTIMONY WAS RESTRICTED

1. Capitalization Testimony Should Have Been Allowed

The Court precluded Lucre's expert, Mike McCann, from telling the jury of his capitalization valuation in its Motion in Limine Order because McCann also had a comparable sales approach he could testify to and because the property was currently not producing income. Motion in Limine at 188 and Order at 367. By presenting his capitalization approach, McCann would have explained that this is the method real market buyers would use in ascertaining the value of the actual Lucre site. Because Lucre was restricted to the use of a comparable sales approach, the jury heard only about other landfill sites across the country. The Government made a four hour long point that McCann's comparable sales were not in Gibson County, and that there was no current landfill on the Lucre site. Since there have not been an abundance of recent landfill sales in Gibson County, the jury should have heard testimony that the capitalization approach is used in the market regardless of where the property is located and regardless of whether a landfill is currently operating. Lucre was prejudiced by letting the jury hear only half of its expert's analysis.

The Constitutions of Indiana and the United States require that landowners receive just compensation for land

taken by the government. *Indiana Constitution Article 1§ 21* and *United States Constitution Amendment V.* In determining just compensation, there are three recognized appraisal methods to determine the value of land: sales, capitalization, and cost approach. *State v. Jones* (1977), Ind.App., 363 N.E.2d 1018. Courts recognize that appraisers usually use all three approaches. *Jones*, 363 N.E.2d at 1024. Consistent with that recognition, a court should not preclude an appraiser from testifying about all methods employed to arrive at an appraisal value. Lucre's expert was prevented from testifying about the complete basis of his appraisal. He was only allowed to explain to the jury one half of his analysis.

The jury should have been allowed to hear McCann's real world market valuation approach. The Court in *Jones*, in justifying the acceptability of the capitalization approach, noted that quarry lands are sold on the market in relation to the income they produce. *Jones*, 363 N.E.2d at 1024. "When the Court adopts the standards of the market place in making valuations, there is no reason why it should close its eyes to how the market place arrives at and applies the standards." *U.S. v. 25.406 Acres of Land* (1949), 4th Cir., 172 F.2d 990, 993, cited in *Jones*, 363 N.E.2d at 1025. Evidence as to the process a prudent developer would employ to arrive at the price he would pay for land to develop is admissible. *State v. Maplewood Heights Corporation* (1973), Ind.App., 302 N.E.2d 782, 785:

> It is proper to take into consideration all facts that an ordinarily prudent man would take into account before forming a judgment as to the market value

of the property he contemplates purchasing.

There was evidence that market buyers routinely use the capitalization approach in evaluating potential landfill sites and base their purchase of such sites upon a capitalization approach. Transcript at 850. With the capitalization approach, McCann valued the Lucre site as a market investor would. Transcript at 853. Properties like the Lucre site are in fact sold on the market in relation to the income they produce. Transcript at 850. McCann would have testified that capitalization is the way that buyers in the market of buying properties for landfill development determine value. Transcript at 848. For this particular kind of property, the capitalization technique is "particularly useful." Transcript at 848 and 849. It is the "standard" of the market place. Transcript at 850. Capitalization is the "best" method to use in combination with the comparable sales approach. Transcript at 850. The capitalization method is exactly what would be used by a prudent developer or purchaser to value the Lucre site. Transcript at 850. The typical method that would have actually been used to value the Lucre site in the market should not have been hidden from the jury.

The Government, because of its eminent domain power, has attempted to circumvent the real world market conditions of obtaining landfill land. Instead of entering into an agreement with the landowner, the Government said "no" and "by the way after we take it we are going to give you only current use value." McCann would have explained how the capitalization approach looks at what a landowner in the market would get as rent for the land itself. Transcript at 851. His analysis does not include operations income. Transcript at 851. McCann distinguished rent from the land from the value of any landfill business operated upon the

land. Transcript at 851. If the Government did not have the power of eminent domain, they would have to pay market prices and should pay market prices now.

Capitalization is proper if income can be "derived from the intrinsic nature of the property itself." *State v. Williams* (1973), Ind.App., 297 N.E.2d 880. 886 (but net profits from a restaurant were derived from a business, not from the intrinsic nature of the land); *Jones*, 363 N.E.2d at 1024 (income from potential quarrying business is intrinsic part of land because the uniqueness of the land itself gives it value). The value of the Lucre site is derived from its intrinsic nature. Transcript at 849. The property is uniquely suited for a landfill. Transcript at 850. It's value is intrinsic to the land because it derives from its air space and the land itself. Transcript at 849. The land is unique in its geology, hydro-geology and location. Transcript at 714, 1438, 1439 and Exh. C at 1206 and Exh. D at 1207. Its soil composition meets the stringent requirements of the Indiana Department of Environmental Management and its location is preferable in part for technical reasons. Exh. C at 1206 and Exh. D at 1207. Because the value of the Lucre site as a landfill is intrinsic from the very soil and airspace itself, the capitalization approach to valuation is appropriate.

The premise of the Government's objection to the capitalization evidence, as articulated in the offer to prove hearing, was that "there's not a landfill on the site." Transcript at 882. In *Jones*, the court determined that it was proper to use a capitalization approach in valuing land which had the potential to be a quarry, although the land condemned was vacant and had yet to be used as a quarry. *Jones*, 363 N.E.2d at 1020, 1025. The Government at trial relied upon *J.J. Newbury Co. v. City of East Chicago* (1982), Ind.App., 441 N.E.2d 39, for the proposition that the

capitalization approach cannot be used on undeveloped land. But that case states that capitalization is proper when the property is "capable of producing the income to be capitalized." *J.J. Newbury* specifically allows the capitalization approach not only for land which is producing income, but also for land which is just "equipped" to do so. 441 N.E.2d at 42. The Lucre site is capable today of producing income. Transcript at 849, 849-850. The land site is uniquely equipped for landfill purposes. Transcript at 848. The site is equipped to produce income because with land for landfill space, "equipped" refers to soil conditions such as permeability and clay content. Transcript at 849-850.

Because buyers of land with intrinsic value as a landfill use the capitalization approach, the jury should have been allowed to hear that half of McCann's analysis. To hear only part of the story, and to exclude the technique most relied on in this market, is reversible error.

2. **Premium Option Price Should Have Been Allowed**

The Government consistently argued at trial a distinction between property with a highest and best use as a "landfill" and property that is only a "potential landfill site." Transcript at 654 and 648. The Government argued, therefore, "raw ground" is what is to be valued as long as some premium is given for that "potential." Transcript at 645, 654, 1660 and 1662. Lucre offered evidence of that premium value -- an option agreement for the City of Evansville to buy the Lucre site for a landfill for $2,000.00/acre. Transcript at 888. Even in 1978 dollars, a $2,000.00/acre for 361 acres equates to $522,000.00 The Court admitted the option only upon redaction of the $2,000.00 Lucre figure, articulating that the $2,000.00 figure

was not relevant to value. Transcript at 754(A) and Order on Motion in Limine to Exclude Option Agreement at 344. That heart of the exhibit should not have been cut because an expert would have testified the figure was relevant to the site's premium value.

Lucre's expert would have testified that the $2,000/acre price was relevant to value because it reflected the degree of difference between the regular strip-mined land and strip-mined land with a highest and best use potential as a landfill. Transcript at 888. The expert believed that strip mined land without that potential was selling for $500 per acre, so the multiple of four disclosed the premium value of the Lucre site. Transcript at 889. The testimony would also have been that, if anything, since that date, the value of landfill sites has increased. Transcript at 888. With that expert testimony, it is clear that in this particular case, the $2,000.00/acre price was relevant to value of the Lucre site.

There is no case law precluding admission of such expert valuation testimony. But there has admittedly also been no declaration that option prices are always admissible. The issue, then, is fact sensitive. The facts here, as disclosed in the offer to prove hearing, show its indisputable relevance to the value of the Lucre site in the opinion of an expert market witness.

In evaluating the admissibility of the $2,000.00/acre option price, it may be helpful to analyze how the Indiana Supreme Court has dealt with offers since no Indiana law on options exists. An option agreement cures the element of concern the Supreme Court found in holding that a mere offer to sell was inadmissible in *State v. Lincoln Memory Gardens, Inc.* (1961), Ind., 177 N.E.2d 655, 658. The Court stated the reason for an offer's inadmissibility was that "the

asking price is only the opinion of one who is not bound by his statement". *Lincoln Memory*, 177 N.E.2d at 658. But the Evansville option does bind the owner to sell for $2,000.00/acre. The option is not a whimsical oral offer of a buyer nor the unrealistic expectation of a seller, but is the result of negotiations, the investment of government officials' time and taxpayer dollars in retaining an attorney to draft and negotiate the detailed agreement. Regardless, in this case, McCann testified that it was in fact relevant in this particular market for this particular site.

Although options are more reliable than offers, even mere unaccepted offers are admissible when they are relevant to such issues as are present in this case. See Unnaccepted Offer for Purchase of Real Property as Evidence of its Value, 25 ALR 4th 571, 577. For example, even offers have been held admissible to prove the existence of an active market or demand for the property, and to support the feasibility of a property's highest and best use. See for example, *Merritt v. Dept. of Transp.* (1978), Ga. App., 248 S.E.2d 689; *Pierper v. Scottsbluff* (1964), Neb., 126 N.W.2d 865; *People by Department of Public Works v. Union Machine Co.* (1955), Cal. App., 184 P.2d 72; and *Vineyard Grove Co. v. Oak Bluffs* (1928), Mass., 163 N.E. 888. Both market demand for a landfill and the suitability of this particular site as a landfill were significant issues at trial. Transcript at 714, 723-738, 744, 745, 748 and 749. The $2,000.00/acre price evidences the unique premium value of the Lucre site as a landfill. A price four times greater that other market prices is relevant to the degree of demand and the degree of feasibility. The jury would have seen indeed that indeed landfill land is different, and more importantly that this very site had been historically recognized as something more valuable than other strip-mined land down the road.

In light of the foundation laid in the offer to prove hearing evidence the relevance of premium value, there is simply no authority for redacting the heart out of the exhibit. A new trial should now be ordered at which the jury will see the whole document and hear from a witness that it evidences premium value.

B. LUCRE IS ENTITLED TO HIGHEST AND BEST USE COMPENSATION

1. Judgment Is Contrary To The Undisputed Highest And Best Use Evidence

The Government continually told the jury that what they should value is just "raw, unimproved, disturbed, abandoned, strip-mined land." Transcript at 645, 646, 648, 650, 655, 908, 913, 916 and 1659. The Government's theme throughout the trial was that Lucre, by valuing a landfill site, was therefore not appraising the right thing." Transcript at 649, 651, and 654. The Government's argument to base compensation only upon the current use, as opposed to the highest and best use, is contrary to law.

The parties, through their witnesses, agreed that the highest and best use of the Lucre site was as a landfill. Lucre's expert describe the land's highest and best use as a landfill. Transcript at 766. The Government's only valuation witness, Lawrence Callis, admitted that the property's highest and best use was as a "landfill with permit." Transcript at 1531. Werner Clem, the president of the Gibson County Commissioners, also admitted that the highest and best use of the land was as a landfill. Transcript at 1203 and 1204. The Government went further in admitting that this was not only a sire that was acceptable or had the potential for landfill development, but was the "best"

site in the County. Transcript at 1202, 1396 and page 3 of Exh. S at 1394. Consistently with the Government's counsel's claim that the Lucre site's current use is "raw," the Government's witnesses admit its highest and best use is as a landfill.

A landowner is entitled to damages "based upon the highest and best use of the property at the time of the taking." *State v. Peterson* (1978), Ind., 381 N.E.2d 83, 85. "If the land has a higher market value by reason of use or uses to which it may be adapted, but to which it had not been put, the owner is entitled to the greater value." *The City of LaFayette v. Beeler* (1978), Ind.App., 381 N.E.2d 1287, 1291 (emphasis added). *The City of Gary, Indiana, et. al., vs. Joseph Belovich et.al.* (1993), Ind.App., 623 N.E.2d 1084, reaffirms the proposition that a land owner is entitled to damages based upon the highest and best use of the property at the time of the taking. *Id.*, at 1088 (emphasis added). A jury should not base its value of property on uses other that the highest and best use when there is no evidence introduced to show that other uses of the property would result in a higher value. *Belovich, et.al.*, 623 N.E.2d at 1090. A jury is not even "permitted" to base value on any use other than the highest and best use. *Id.*, at 1090.

Because of the testimony from Callis and Clem admitting that a landfill was the highest and best use, it was inappropriate for the Court to permit a jury to base value on any other use, including its less valuable current use. The only evidence presented of the value of the Lucre site at is landfill highest and best use was by Mike McCann. Transcript at 766 and 783. The Government failed to present any evidence of the value of the property at its landfill highest and best use. Callis valued the 261 acre Lucre site at $500/acre. Transcript at 1529. Callis's $500.00/acre figure

does not value the property at its highest and best use. Transcript at 1530. Instead, Callis stated that he was valuing the property at its current use and not as it could reasonably be adapted for a higher use. Transcript at 1530. Callis admitted that his $500.00/acre does not even consider the value of the land as a landfill. Transcript at 1532. However, he admitted that the property had a highest and best use that would yield greater value that its current use but he failed to present any evidence as to its value. Transcript at 1531.

Because the jury cannot be permitted to consider any value less than a highest and best use, Lucre moved the Court for judgment on the only highest and best use valuation evidence presented. Lucre moved for that judgment on the only highest and best use valuation evidence both before and after the jury's verdict. Transcript at 1550 and 515. Because the judgment is clearly erroneous to the undisputed highest and best use evidence, without regard to the credibility of any witness, this Court should reverse the judgments as contrary to the evidence. This Court should reverse the trial court's denial of the motions for judgment on the evidence and enter final judgment on the evidence in the amount of $6,300,000.00. At a minimum, this Court should order a new trial with an instruction to the trial court that a landowner is entitled to just compensation for land at its highest and best use.

2. Highest And Best Use Instructions Were Erroneous

The Court improperly instructed the jury on the extent to which it must consider the Lucre site's future highest and best use as a landfill, regardless of current use.

Lucre tendered a pattern instruction to insure that the jury would consider all damages. Lucre tender its Final Instruction No. 2 which reads:

> The landowner is **entitled** to recover all damages, present or **prospective**, that are a natural or reasonable result of the taking.

Indiana Pattern Jury Instruction No 29.19. Transcript at 493 (emphasis added). The Government objected to Lucre's Instruction No. 2 on the basis that the instruction is only relevant to a partial take case with residue damage issues. Transcript at 1614-1615. But the comments to the pattern specifically address that claim by confirming the instruction as tendered is appropriate for a total take case. Indiana Pattern Jury Instructions 29.19, Comments. The Court denied giving the instruction and instead gave its final instruction 8A (Transcript at 1627), to which Lucre objected. Transcript at 1630. The Court's final instruction 8A reads:

> In determining the amount of compensation that Lucre Corporation is entitled to recover as a result of the taking, you may consider any evidence that affects the value on the date of taking in arriving at a fair market value.
>
> However, the inquiry as to the value of the land cannot go into an intended specific future use, because such damages are speculative, and that such **inquiry must be confined to the land**

> **with reference to the condition at the time of taking.**

Transcript at 504 (emphasis added). Lucre's objection to the denial of Lucre's proposed Final Instruction 2 and its objection to Court's instruction 8A reads:

> We'd also object to the Court's Instruction Number Eight-A for the reason that it's an inaccurate statement of the law. There are no facts in the record to support giving of the instruction. More particularly, Eight-A is an adaption of the highest and best use instruction. The highest and best use instruction that should be given is the pattern jury instruction which is the Court's tendered Number Eight. It's inconsistent with that instruction. More specifically, it refers to a condition at the time of taking of the land that's an inaccurate statement of the law of Indiana because this jury's instruction to the contrary that the land, as it can be reasonably adapted at the time of taking, is what should be looked at for purposes of valuation. There's not evidence of any intended specific future use before the jury. There's no evidence of speculative damages.
>
> Finally, we would object for the Court's failure to give our Defendant's tendered Instruction Number Two

> concerning damages. It's a pattern instruction, 29.19,concerning damages present or prospective. The comments to the pattern jury instruction make it clear that this applies to a total take and , especially, in light of the Court's giving its Eight-A, it's crucial that this jury know that in addition to the highest and best use law, we are recover--entitled to recover all damages present or prospective as long as it is a natural and reasonable result of the taking. That's all, Your Honor.

Transcript at 1629-1630.

The Court's instruction 8A tells the jury that it "must" confine its inquiry to the "condition" of the land "at the time of the taking." That is an incorrect statement of the law. In order to award just compensation, a land's "current condition" cannot restrict the award. Certainly the land must at the time of take with reasonable adaptation be capable of having the higher use, but the essence of a highest and best use analysis is to look prospectively at a reasonable adaptation of current condition. *City of LaFayette v. Beeler (1978), Ind.App.*, 381 N.E.2d 1287 at 1291 and *State v. City of Terre Haute* (1968), Ind., 238 N.E.2d 459 at 461. 8A prohibits that prospective reasonable adaptation analysis. The instruction is also an "intended specific future use instruction," but there was no such claim at trial.

In *Belovich*, 623 N.E.2d at 1090, the court held that the trial court should refuse instructions that would permit the jury to base value on other uses other than the highest

and best use. Not only does instruction 8A "permit" the jury to award damages based on something other than highest and best use, the instruction suggests that the jury "must" confine itself to current use. The jury is not confined to current use but must look at the use that the property may be adapted. *Id.*

Because the jury was not properly instructed, this Court should order a new trial.

APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REHEARING
(pp. 6-11)

A. JURY INSTRUCTION WAS FATALLY FLAWED

A property owner is entitled to the highest and best use value for his property in eminent domain proceedings. City of Lafayette v. Beeler (1978), 178 Ind.App. 281, 287, 381 N.E.2d 1287, 1291. Jury instruction 8A misstated that law. Instruction 8A stated:

> In determining the amount of compensation that Lucre Corporation is entitled to recover as a result of the taking, you may consider any evidence that effects the value on the date of the taking in arriving at a fair market value. However, **the inquiry as to the value of the land** cannot go into an intended specific use, because such damages are speculative, and that such inquiry **must be confined to the land with reference to its condition at the time of taking.** Transcript at 504. (emphasis added)

A statement that the jury's "**inquiry as to the value of the land... must be confined to the land with reference to its condition at the time of taking**", confining the inquiry to the then current use, or condition, is contrary to established law which requires renumeration instead for the land's highest and best use.

Jury instructions that are contrary to law may not be cured by further instructions which correctly state the law because to do so leaves to the jury the task of determining which of the conflicting "laws" to apply. Hainey v. Zink (1979) 182 Ind.App. 192, 196, 394 N.E.2d 238, 242. Because instruction 8A was clearly contrary to the law, even though other instructions may have correctly stated the law, the Court must remand this matter for a new trial. To do otherwise will leave to the jury the impermissible task of deciding between the two "laws" presented for their consideration.

B. OPTION CONTRACT EXCLUSION WAS IMPROPER

The exclusion of a relevant option contract valuation of the property, by redacting it from the contract, was improper. The heart of the exhibit should not have been cut because an expert would have testified the figure itself was relevant to the site's premium value. An expert testified in a thorough offer to prove hearing that the option figure itself (which was purchased for $1 and other consideration) was in this case relevant for this particular market for this particular site. Transcript at 888. Expert testimony on the issue of the value of property in eminent domain proceedings is relevant under the very board scope of Ind.Evidence Rule 402. Hainey v. Zink (1979) 182 Ind.App. 192, 196, 394 N.E.2d 238, 242. The issue is fact sensitive. The Trial Court in refusing to admit the option contract did not make a basic relevancy inquiry into the testimony of the expert, but in effect determined as a matter of law that expert testimony on land valuation is inadmissible when the expert is going to verify the valuation of the land contained within a contract for an option to purchase land. Transcript at 334. Perhaps it can be argued in another case whether options are admissible

as a matter of law, but in this case, the government failed to present any evidence disputing the factual relevancy testimony in the offer to prove hearing.

The Supreme Court has stated the reason offers (not options) are generally inadmissible is "the asking price is only the opinion of one who is not bound by his statement." State v. Lincoln Memory Gardens, Inc. (1961) Ind. 177 N.E. 2d 655,658. An option is more than a mere offer to sell. It is agreed to by both parties. The option for the Lucre site does bind the owner to sell for $2,000 per acre and the option specifically planned for the use of the land as a landfill. Transcript at 754(A).

The option contract's valuation of the property, with supporting expert testimony, whose credibility is the jury's duty to decide, is relevant and should not have been excluded from the jury's consideration. However, the Court has stated in its prior opinion that the matter of option contracts being used for property valuation is a new question of law in Indiana. If so, Lucre respectfully requests that the Court reexamine its stated position on this issue to determine the law as to the allowance of option contract valuations when there is expert testimony offered to support the valuation.

C. VALUATION BY INCOME CAPITALIZATION IS APPROPRIATE

Income capitalization testimony was improperly excluded from the jury. Income capitalization may not be used if the property is neither capable of producing income nor actually producing income. J.J. Newbury v. City of East Chicago (1982), Ind.App., 441 N.E.2d 39, 42-43. The capable of producing income prong of the test has been further split into two distinct groups of cases. The first group

contains land which has an intrinsic value due to the land itself. Stone quarries have been determined to have an intrinsic value due to the value of the actual dirt that makes the land itself. State v. Jones (1977), 173 Ind.App. 243, at 252-253, 363 N.E.2d 1018, at 1024. Land with an intrinsic value may be valued by the income capitalization approach. Jones at 254 and 1025. Landfills, like stone quarries, are valued for the dirt of which the land is made. Landfills must have a specific geology and hydro-geology. Transcript at 714, 850, 1438, 1439 and Exh. C 1206. As a result landfills have an intrinsic value and under the J.J. Newbury test, as explained in Jones, are entitled to be valued by the income capitalization method.

The second group of cases under the "capable of producing income" prong of the J.J. Newbury test consists of property which does not have an intrinsic value and which does not have a currently operating business enterprise upon it. In such a case like the land in the J.J Newbury case, the Court has correctly determined that the income capitalization method of valuation is too speculative to be relied upon.

In its prior opinion the Court determined that Lucre's property was not producing income, nor was it capable of producing income as a landfill based upon the "no intrinsic value" group of cases of the "capable of producing income" test in J.J. Newbury. Opinion at 5. If Lucre's property fell within this group of cases the Court would have been correct in its decision that the Lucre property was neither producing nor capable of producing income. However, the Court's underlying assumption is incorrect because the property has intrinsic value, and therefore the capacity to produce income.

D. VERDICT IS OUTSIDE RANGE OF PROBATIVE EVIDENCE

A jury's award cannot stand where the award is not within the bounds of probative evidence adduced at trial. Opinion at 11. The issue, in the context of eminent domain, is what is "probative." A landowner is **entitled** to the value of the highest and best use of the land being taken. City of Lafayette v. Beeler (1978), 178 Ind.App. 281, 287, 381 N.E.2d. 1287, 1291. Any evidence of the value of the highest and best use of the land is therefore probative, and by definition any valuation evidence based upon any use other than highest and best use is not probative.

The parties, through their witnesses, agreed that the highest and best use of the Lucre site was as a landfill. Transcript at 766, 1203, 1204 and 1531. Therefore only evidence of the value of the land as a landfill is probative. The only evidence of the value of the land as a landfill indicates that the landfill highest and best use value of the Lucre property was $6,300,000.00. Another valuation of the land based solely on the current use of the property and not on the property's highest and best use as a landfill was therefore not probative. As a result, the range of probative evidence consisted only of the $6.3 million valuation. The jury award of $130,500 does not fall within the range of probative evidence. Although the Court has correctly stated that it will not normally overturn an award of damages in an eminent domain proceeding, it must do so where the jury award does not fall within the range of probative evidence produced at trial. Opinion at 12 and Gradison v. State (1973), 260 Ind. 688, at 705, 300 N.E.2d 67, at 74-75.

Because the jury's award is outside the range of probative evidence, the jury's verdict must be set aside.

APPELLANT'S BRIEF IN SUPPORT OF PETITION TO TRANSFER
(pp 6-11)

A. VERDICT IS OUTSIDE RANGE OF PROBATIVE EVIDENCE

A jury's award cannot stand where the award is not within the bounds of probative evidence adduced at trial. Opinion at 11. The issue, in the context of eminent domain, is what is "probative." A landowner is **entitled** to the value of the highest and best use of the land being taken. City of Lafayette v. Beeler, 178 Ind.App. 281, 287, 381 N.E.2d. 1287, 1291 (1978). Any evidence of the value of the highest and best use of the land is therefore probative, and by definition any valuation evidence based upon any use other than highest and best use is not probative.

The parties, through their witnesses, agreed that the highest and best use of the Lucre site was as a landfill. Transcript at 766, 1203, 1204 and 1531. Therefore only evidence of the value of the land as a landfill is probative. The only evidence of the value of the land as a landfill indicates that the landfill highest and best use value of the Lucre property was $6,300,000.00. Another valuation of the land based solely on the current use of the property and not on the property's highest and best use as a landfill was therefore not probative. As a result, the range of probative evidence consisted only of the $6.3 million valuation. The jury award of $130,500 does not fall within the range of probative evidence. Although the Court of Appeals has correctly stated that it will not normally overturn an award of damages in an eminent domain proceeding, it must do so

where the jury award does not fall within the range of probative evidence produced at trial. Opinion at 12 and Gradison v. State, 260 Ind. 688, 705, 300 N.E.2d 67, 74-75 (1973).

Because the jury's award is outside the range of probative evidence, the jury's verdict must be set aside and the Court should reverse the Trial Court's denial of Lucre's Motion for Judgment on the Evidence. The Court should enter a Judgment for Lucre in the amount of $6,300,000 because that amount is the only probative evidence as to the highest and best use value of the land. Lucre admits that if the Court so enters a Judgment that the remaining issues in this appeal are moot.

B. JURY INSTRUCTION WAS FATALLY FLAWED

A property owner is entitled to the highest and best use value for his property in eminent domain proceedings. City of Lafayette v. Beeler, 178 Ind.App. 281, 287, 381 N.E.2d 1287, 1291 (1978). Jury instruction 8A misstated that law. Instruction 8A stated:

> In determining the amount of compensation that Lucre Corporation is entitled to recover as a result of the taking, you may consider any evidence that effects the value on the date of the taking in arriving at a fair market value. However, **the inquiry as to the value of the land** cannot go into an intended specific use, because such damages are speculative, and that such inquiry **must be confined to the land with reference to its condition at the**

time of taking. Transcript at 504. (emphasis added)

A statement that the jury's "**inquiry as to the value of the land... must be confined to the land with reference to its condition at the time of taking**", confining the inquiry to the then current use, or condition, is contrary to established law which requires remuneration instead for the land's highest and best use.

Jury instructions that are contrary to law may not be cured by further instructions which correctly state the law because to do so leaves to the jury the task of determining which of the conflicting "laws" to apply. Hainey v. Zink, 182 Ind.App. 192, 196, 394 N.E.2d 238, 242 (1979). Because instruction 8A was clearly contrary to the law, even though other instructions may have correctly stated the law, the Court should remand this matter for a new trial. To do otherwise will leave to the jury the impermissible task of deciding between the two "laws" presented for their consideration.

C. OPTION CONTRACT EXCLUSION WAS IMPROPER

The exclusion of a relevant option contract valuation of the property, by redacting it from the contract, was improper. The heart of the exhibit should not have been cut because an expert would have testified the figure itself was relevant to the site's premium value. An expert testified in a thorough offer to prove hearing that the option contract figure itself was in this case relevant for this particular market for this particular site. Transcript at 888. Expert testimony on the issue of the value of property in eminent domain proceedings is relevant under the very board scope of

Ind.Evidence Rule 402. Hainey v. Zink, 182 Ind.App. 192, 196, 394 N.E.2d 238, 242 (1979). The issue is fact sensitive. The Trial Court in refusing to admit the option contract did not make a basic relevancy inquiry into the testimony of the expert, but in effect determined as a matter of law that expert testimony on land valuation is inadmissible when the expert is going to verify the valuation of the land contained within a contract for an option to purchase land. Transcript at 334. Perhaps it can be argued in another case whether options are admissible as a matter of law, but in this case, the government failed to present any evidence disputing the factual relevancy testimony in the offer to prove hearing.

The Supreme Court has stated the reason offers (not options) are generally inadmissible is "the asking price is only the opinion of one who is not bound by his statement." State v. Lincoln Memory Gardens, Inc., Ind. 177 N.E. 2d 655,658 (1961). An option is more than a mere offer to sell. It is agreed to by both parties. The option for the Lucre site does bind the owner to sell for $2,000 per acre and the option specifically planned for the use of the land as a landfill. Transcript at 754(A).

The option contract's valuation of the property, with supporting expert testimony, whose credibility is the jury's duty to decide, is relevant and should not have been excluded from the jury's consideration. However, the Court of Appeals has stated that the matter of option contracts being used for property valuation is a new question of law in Indiana. If so, Lucre respectfully requests that the Court re-examine the Court of Appeals' stated position on this issue to determine the law as to the allowance of option contract valuations when there is expert testimony offered to support the valuation.

D. VALUATION BY INCOME CAPITALIZATION IS APPROPRIATE

Income capitalization testimony was improperly excluded from the jury. Income capitalization may not be used if the property is neither capable of producing income nor actually producing income. J.J. Newbury v. City of East Chicago, 441 N.E.2d 39, 42-43 (Ind. Ct.App. 1982). The capable of producing income prong of the test has been further split into two distinct groups of cases. The first group contains land which has an intrinsic value due to the land itself. Stone quarries have been determined to have an intrinsic value due to the value of the actual dirt that makes the land itself. State v. Jones, 173 Ind.App. 243, at 252-253, 363 N.E.2d 1018, at 1024 (1977). Land with an intrinsic value may be valued by the income capitalization approach. Jones at 254 and 1025. Landfills, like stone quarries, are valued for the dirt of which the land is made. Landfills must have a specific geology and hydro-geology. Transcript at 714, 850, 1438, 1439 and Exh. C 1206. As a result landfills have an intrinsic value and under the J.J. Newbury test, as explained in Jones, and are entitled to be valued by the income capitalization method.

The second group of cases under the "capable of producing income" prong of the J.J. Newbury test consists of property which does not have an intrinsic value and which does not have a currently operating business enterprise upon it. In such a case, like the land in the J.J Newbury case, the Court of Appeals has correctly determined that the income capitalization method of valuation is too speculative to be relied upon.

The Court of Appeals determined that Lucre's property was not producing income, nor was it capable of

producing income as a landfill based upon the "no intrinsic value" group of cases of the "capable of producing income" test in J.J. Newbury. Opinion at 5. If Lucre's property fell within this group of cases the Court of Appeals would have been correct in its decision that the Lucre property was neither producing nor capable of producing income. However, the Court of Appeals' underlying assumption is incorrect because the property has intrinsic value, and therefore the capacity to produce income.

LUCRE'S MOTION FOR JUDGMENT ON THE EVIDENCE

(Record of Proceedings at 515-517)

Comes now the Defendant, Lucre Corporation, by counsel, and moves the Court pursuant to Trial Rule 50 of the Indiana Rules of Trial Procedure for judgment on the evidence, and in support of this Motion states:

1. Trial Rule 50(A) provides that "where all or some of the issues in a case tried before a jury or an advisory jury are not supported by sufficient evidence or a verdict thereon is clearly erroneous as contrary to the evidence because the evidence is insufficient to support it, the court shall withdraw such issues from the jury and enter judgment thereon or shall enter judgment thereon notwithstanding a verdict." (emphasis added)

2. Trial Rule 50(B) provides that "every case tried by a jury is made subject to the right of the court, before or after the jury is discharged, to enter final judgment on the evidence, without directing a verdict thereon."

3. "When a judgment on the evidence is sought before or after the jury is discharged, the court may grant a new trial as to part or all of the issues in lieu of a judgment on the evidence when entry of a judgment is impracticable or unfair to any of the parties or otherwise is improper, whether requested or not." Trial Rule 50(C).

4. Based upon these provisions of Trial Rule 50, Defendant asks the Court to not enter judgment in the amount of the verdict because the evidence presented was insufficient to support the verdict of the jury.

5. A landowner is entitled to damages "based upon the highest and best use of the property at the time of the taking." State v. Peterson, 381 N.E.2d 83, 85 (Ind. 1978). "If the land has a higher market value by reason of use or uses to which it may be adapted, but to which it had not been put, the owner is entitled to the greater value." City of LaFayette v. Beeler, 381 N.E.2d 1287, 1291 (Ind.App. 1978) (emphasis added).

6. The only evidence presented of the value of the subject property at its highest and best use was by Defendant's witness, Mike McCann.

7. The Plaintiff failed to present any evidence of the value of the property at its highest and best use.

8. Plaintiff's only valuation witness, Lawrence Callis, admitted that the property's highest and best use was a "landfill with permit," as shown in the transcript attached hereto as Exhibit "A."

9. Lawrence Callis did not, however value the property at its highest and best use. Instead, he stated that he was valuing the property at its current use and not as it could reasonably be adapted for a higher use.

10. It is undisputed that the landowner is entitled to the property being valued at its highest and best use and that its current use was not its highest and best use.

11. The only evidence presented on the value of the property for its highest and best use was the evidence presented by the Defendant's witness, Mike McCann.

WHEREFORE, Defendant, Lucre Corporation, prays for the Court to enter judgment on the evidence and award the landowner the value of the property at its highest and best use and for all proper relief.

LUCRE'S SUBMISSION OF ADDITIONAL AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGMENT ON THE EVIDENCE

(Record of Proceedings at 566-567)

Comes now the Defendant, Lucre Corporation, by counsel, and files this Submission Of Additional Authority In Support Of Defendant's Motion For Judgment On The Evidence. Subsequent to the hearing on Defendant's motion, the attached case of The City of Gary, Indiana, et.al., vs. Joseph Belovich, et.al., 623 N.E.2d 1084, was distributed. This most recent case reaffirms the proposition that a land owner is entitled to damages based upon the highest and best use of the property at the time of the taking. Id., at 1088. The Court states that a jury should not base its value of property on uses other than the highest and best use when there is no evidence introduced to show that other uses of the property would result in a higher value.

The Court confirms that a jury is not even "permitted" to base value on any use other than the highest and best use. Id., at 1090. Like Gary, the parties in Lucre, through their witnesses, agreed that the highest and best use was as a landfill.

WHEREFORE, Defendant, Lucre Corporation, prays that the Court grant its Motion For Judgment on the Evidence.

TRIAL COURT'S ENTRY OF FINAL JUDGMENT ON EXCEPTION OF DEFENDANT TO REPORT OF APPRAISERS

(Record of Proceedings at 566-567)

This cause having come before the Court for trial by Jury on November 29, 1993, through December 3, 1993, the parties appearing personally and by counsel, and the issue of the value of the property taken by Plaintiff by Order of Appropriation of Real Estate and Appointment of Appraisers dated August 7, 1992, and Exceptions of Defendant to Report of Appraisers filed on September 24, 1992, and the Jury having rendered its verdict and having assessed damages in the amount or $130,500.00 for Defendant;

And it appearing to the Court from the record in this cause that on September 4, 1992, appraisers appointed by this Court to assess the damages sustained by Defendant filed herein their Report of Appraisers' assessing the damage of Defendant at $130,000.00;

And it further appearing to the Court that Plaintiff has not paid to the Clerk of the Court the damages thus assessed to Defendant by said appraisers;

And it further appearing to the Court that ten(10) or more days prior to trial Plaintiff submitted a written offer of settlement to Defendant which exceeded the total of the damages awarded by the verdict of the Jury returned for Defendant;

And the Court, having jurisdiction over the parties and the subject matter pursuant to Ind. Code 32-11-1-1 et. seq. hereby

ORDERS, ADJUDGES, AND DECREES that Defendant, Lucre Corporation, have and recover from Plaintiff, County of Gibson, State of Indiana, the sum of $130,500.00, together with interest at the statutory rate of eight percent(8%) per annum from the date of appropriation, August 7, 1992, until the date Plaintiff, County of Gibson, State of Indiana, pays to the Clerk of the Court the damages assessed to Defendant, costs paid.

LUCRE'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE EVIDENCE BASED UPON CAPITALIZATION OF INCOME APPRAISAL METHOD

(Record of Proceedings at 270-272)

Defendant, Lucre Corporation, by counsel, respectfully requests that the Court deny the Plaintiff's Motion in Limine to Exclude Evidence Based Upon Capitalization of Income Appraisal Method, and files this Brief in Opposition to Plaintiff's Motion.

The Constitution of Indiana requires that landowners receive the fair market value for land taken be the government. In determining the fair market value of any land, there are three recognized appraisal methods: sales, capitalization, and cost approach. State v. Jones, 363 N.E.2d 1018 at 1024 (Ind.App. 1977).

Courts should remain flexible on the use of different appraisal methods. "Since many variables are involved, the Courts cannot say that one method of valuing property should be universally used to the exclusion of all others." Jones, 363 N.E.2d at 1024. "In the majority of his assignments, the appraiser utilizes all three approaches... Jones, 363 N.E.2d at 1024.

The income capitalization approach has been approved by Indiana courts and is appropriate in the current matter. In Jones, the court determined that it was proper to use an income capitalization approach in evaluating land which had the potential to be a quarry, although the land condemned was vacant and had never been mined. Jones, 363 N.E.2d at 1020 and 1025.

The Court in Jones in justifying the acceptability of an income capitalization approach stated: "there is ample evidence in the case at bar which shows that quarry lands have value beyond that of ordinary commercial, industrial land, and are sold on the market in relation to the income they produce." Jones, 363 N.E.2d at 1024. Plaintiff's own experts conclude that the subject property's highest and best use is as a landfill. Like quarries, landfills have value beyond that of the ordinary commercial, industrial land, and there will be substantial evidence to this fact. Further, there will be substantial evidence that waste management companies routinely use the capitalization approach in evaluating potential landfill sites and base their purchase price of sanitary landfill sites upon a capitalization approach.

Income capitalization is proper if the income is "derived from the intrinsic nature of the property itself." State v. Williams, 297 N.E.2d 880. 886 (Ind.App. 1973) (restating that general rule that capitalization is proper when the income is derived from the intrinsic nature of the property itself, but holding that income from a restaurant was not from the intrinsic nature of the property). See Jones, 363 N.E.2d at 1024 (income from quarrying business is intrinsic part of land).

The property's value in the present case is derived from the intrinsic nature of the land. There will be substantial evidence that this property is uniquely situated to being a landfill because of its intrinsic nature. Its soil composition meets the stringent requirements of the Indiana Department of Environmental Management and its location is preferable for technical, economic and political reasons. Income is derived from the intrinsic nature of the land and buyers in the industry use a capitalization approach to determine the value of potential landfill sites. "When the

Court adopts the standards of the market place in making valuations, there is no reason why it should close its eyes to how the marked place arrives at and applies the standards." U.S. v 25.406 Acres of Land, 172 F.2d 990, 993 (4th Cir. 1949). The jury should be allowed to hear this real world landfill appraisal technique.

WHEREFORE, Defendant respectfully requests the Court to deny Plaintiff's Motion in Limine To Exclude Evidence Based Upon Capitalization of Income Appraisal Method and for all proper relief.

ORDER ON MOTION IN LIMINE TO EXCLUDE EVIDENCE BASED UPON THE CAPITALIZATION OF INCOME APPRAISAL METHOD

(Record of Proceedings at 367)

Plaintiff, County of Gibson, State of Indiana, by counsel, having filed its Motion in Limine to Exclude Evidence Based Upon The Capitalization Of Income Appraisal Method, which Motion is in the following words and figures, to wit:

(H.I.)

And the Court, having considered said Motion and being otherwise duly advised, now finds that said Motion should be and hereby is GRANTED.

IT IS THEREFORE ORDERED that defendant, Lucre Corporation, and its counsel, not mention, refer to, interrogate concerning, or attempt to convey to the jury in any manner, either directly or indirectly, any evidence relation to the capitalization of income method of appraising the real estate at issue in this action without first obtaining permission of the Courts outside the presence and hearing of the jury, and Defendant and its counsel shall not make any ...

TRIAL COURT'S RULING AT TRIAL ON INCOME CAPITALIZATION MOTION IN LIMINE

(Record of Proceedings at 882-883)

JUDGE STRATTON

Well, I thought the court had already ruled on this anyway.

MR. JEFFREY A. WILHITE, DEFT ATTY.

In limine.

JUDGE STRATTON

Right.

MR. JEFFREY A. WILHITE, DEFT ATTY.

Right. So this is my offer of proof and, uh, while you've ruled it in limine, I think you have the opportunity now that you've been educated with exactly what the testimony would be to allow it before the jury so I would reiterate that request at this point.

JUDGE STRATTON

The court's going to maintain its ruling on the motion in limine which made in its order on November 17, 1993.

LUCRE'S OBJECTION TO JURY INSTRUCTION 8A
(Record of Proceedings at 1629-1630)

We'd also object to the Court's Instruction Number Eight-A for the reason it's an inaccurate statement of the law. There are no facts in the record to support giving of the instruction. More particularly, Eight-A is an adaptation of the highest and best use instruction. The highest and best use instruction that should be given is the pattern jury instruction which is the Court's tendered Number Eight. It's inconsistent with that instruction. More specifically, it refers to a condition at the time of taking of the land that's an inaccurate statement of the law in Indiana because this jury's instructed to the contrary that the land, as it can be reasonably adapted at the time of taking, is what should be looked at for purposes of valuation. There's not evidence of any intended specific future use before the jury. There's no evidence of speculative damages. Finally, we would object for the Court's failure to give our Defendant's tendered Instruction Number Two concerning damages. It's a pattern instruction, 29.19, concerning damages present or prospective. The comments to the pattern jury instruction make it clear that this applies to a total take and, especially, in light of the Court's giving its Eight-A, it's crucial that this jury know that in addition to the highest and best use law, we are recover--entitled to recover all damages present or prospective as long as it is a natural and reasonable result of the taking. That's all, Your Honor.

INSTRUCTION 8A AS READ TO JURY

(Record of Proceedings at 1707)

In determining the amount of compensation that Lucre Corporation is entitled to recover as a result of the taking, you may consider any evidence that affects the value on the date of taking in arriving at a fair market value. However, the inquiry as to the value of the lane cannot go to an intended, specific, future use because such damages are speculative and that such inquiry must be confined to the land with reference to its condition at the time of taking.

LUCRE'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION TO EXCLUDE OPTION AGREEMENT

(Record of Proceedings at 257-259)

Defendant, Lucre Corporation, by counsel, respectfully requests that the Court deny the Plaintiff's Motion in Limine to Exclude Option Agreement, and files this Brief in Opposition Agreement, and files this Brief in Opposition to Plaintiff's Motion.

The Plaintiff seeks to preclude the jury from considering a 1978 option agreement between the City of Evansville and the owner of the subject property to purchase the property for $2,000.00 per acre for a landfill, (a copy is attached hereto as Exhibit "A"). Presumably the Plaintiff's objection is one of relevance. However, the option agreement is relevant to several important issues.

The Evansville option agreement is clearly relevant to the property's highest and best use as a landfill. In addition, the option is relevant to where on the continuum of value within the highest and best use category the subject property lies. Plaintiff's experts classify the subject property as a "green field" landfill site which in their opinion is at the low end of the spectrum of landfill land. Plaintiff's Appraisal Report, page viii, preface. The option indicates the subject property is not on the low end of the spectrum. Further, the option of the City of Evansville to purchase the land for a landfill site clearly reflects a market interest and demand in the property, which element of evaluation is discussed on page ix in the preface of the Plaintiff's appraisal report. Even Plaintiff's appraisal indicates that options reflect a market interest in, and consideration of, unpermitted landfill sites.

In this particular matter, the Evansville option agreement is clearly relevant to the many issues above, but Plaintiff is correct that there has been no declaration that options are always admissible. In evaluating the admissibility of the Evansville option, it is helpful to analyze how the Indiana Supreme Court has dealt with offers.

An option agreement cures the element of concern the Indiana Supreme Court found in holding that a mere offer to sell was inadmissible in State v. Lincoln Memory Gardens, Inc., 177 N.E.2d 655, 658 (Ind. 1961). The Court states the reason for an offer's inadmissibility was that "it is incompetent to prove the market value of the property because the asking price is only the opinion of one who is not bound by his statement..." Lincoln Memory, 177 N.E.2d at 658. The Evansville option does bind the owner to sell for the price set forth in the terms of the agreement. Further, the price is not only the opinion of the owner but is a result of a negotiated price. The option is not a whimsical oral offer of a buyer nor the unrealistic expectation of a seller, but is the result of negotiations, the investment of government officials' time, and taxpayer dollars in retaining and attorney to draft and negotiate the detailed agreement.

Although it is clear that options are more reliable than offers, even mere unaccepted offers have been held to be admissible when they are relevant to such issues as are present in this case. See Unaccepted Offer for Purchase of Real Property as Evidence of its Value, 25 ALR 4th 571, 577. For example, unaccepted offers to purchase have been held admissible to prove the existence of an active market or demand for the property, to test the credibility of expert witnesses, and to support the feasibility of a property's highest and best use. See for example, Merritt v. Department of Transp., 248 S.E.2d 689 (Ga. App. 1978); Pieper v.

Scottsbluff, 126 N.W.2d 865 (Neb. 1964); People by Department of Public Works v. Union Machine Co., 184 P.2d 72 (Cal. App. 1955); and, Vineyard Grove Co. v. Oak Bluffs, 163 N.E. 188 (Mass. 1928).

In the present case, the option is relevant to many issues, including those raised and stressed by the Plaintiff's experts. The jury should be allowed to consider the option and weigh its importance in light of its obvious relevance.

TRIAL COURT'S ORDER ON MOTION IN LIMINE TO EXCLUDE OPTION AGREEMENT

(Record of Proceedings at 334-335)

The plaintiff, County of Gibson County, State of Indiana, by counsel, having filed its Motion in Limine to Exclude Option Agreement, and the Court having considered said motion, Defendant's Brief in Opposition, and argument of counsel, and being duly advised now finds that said option agreement is relevant to the property's highest and best use but the stated option price per acre is not relevant to the fair market value of the subject real estate on the date of taking, and the Court finds that said motion should be granted in part and denied in part.

IT IS THEREFORE ORDERED by the Court that defendant, Lucre Corporation, and its counsel not mention, refer to, interrogate concerning, or attempt to convey to the jury in any manner, either directly or indirectly, price per acre or total price of that certain "option agreement", dated September 11, 1978 between C. James Youngs, d/b/a Youngs Development Company, and the City of Evansville, Indiana, without first obtaining permission of the Court outside the presence and hearing of the jury, and defendant and its counsel shall not make any reference to the fact that plaintiff's motion was filed and granted in part and defendant and its counsel shall warn and caution each and everyone of defendant's witnesses to strictly follow these same instructions.

BEGINNING OF LUCRE'S OFFER TO PROVE
OPTION CONTRACT VALUATION
(Record of Proceedings at 888)

MR. JEFFREY A. WILHITE, DEFT ATTY.

Okay. Next offer of proof concerns the auction price, Your Honor. We'd present testimony that not only is the option which is already in evidence, but the two thousand dollar per acre number is additionally relevant to current value because it is reflective of the degree of difference between regular strip-mined land and strip-mined land which has a highest and best use potential as a landfill. That if anything since then, the value has increased. Its remoteness in time simply means that at a minimum today it's be worth two thousand an acre but it would be worth even more today and it's the degree of difference between strip-mined lands at that time which the evidence would show through several witnesses in this trial as in a , I think, five hundred dollar range, it's that multiple that's relevant to current value.

TRIAL COURT'S RULING ON OFFER TO PROVE OPTION CONTRACT

(Record of Proceedings at 893)

Court does not see any legal reason for changing its ruling on the option price per acre as contained in the option agreement and will confirm its ruling in the order on the motion in limine to exclude the option agreement dated November 3, 1993.